

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRENDA YOUNG

Claimant

VS.

GREAT BEND COOPERATIVE ASSN.

Respondent

AND

TRIANGLE INSURANCE CO.

Insurance Carrier

Docket No. **1,053,412**

ORDER

Respondent and its insurance carrier request review of the June 27, 2012 Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on November 6, 2012.

APPEARANCES

Lawrence M. Gurney of Wichita, Kansas, appeared for claimant. Eric T. Lanham of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the entire record and adopts the stipulations listed in the Award.

ISSUES

The ALJ found claimant sustained personal injury by accident arising out of and in the course of his employment and that claimant suffered a 75.5% work disability, based upon a 100% wage loss and Dr. Gerald Kerby's 51% task loss opinion. The parties stipulated that claimant has a 20% whole person functional impairment, half of which was attributable to her work-related injury. The parties therefore agreed that claimant's

accidental injury injury resulted in a 10% permanent functional impairment to the whole person.¹

Respondent maintains the ALJ erred in finding that K.S.A. 2010 Supp. 44-501(d)(2), which embodied the so-called “intoxication defense”² that was in effect when this claim arose, did not relieve respondent of liability to provide workers compensation benefits to claimant. Respondent argues claimant’s history of smoking tobacco and crack cocaine contributed to her injury and disability. Respondent contends the ALJ erred in disregarding Dr. Kerby’s uncontroverted medical testimony and urges the Board to reverse Judge Moore’s Award and deny compensation.

Claimant argues the ALJ’s Award should be affirmed.

The issues before the Board are:

1. Whether claimant sustained personal injury by accident arising out of and in the course of her employment with respondent; and,
2. Whether the intoxication defense is applicable to this claim.

FINDINGS OF FACT

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties’ briefs and oral arguments, the Board makes the following findings:

Claimant was age 49 when she was deposed on August 2, 2011. She worked for respondent as a scale house operator during the 2009 fall harvest. Her job was to weigh grain trucks, remove the grain from those vehicles, and test the moisture content and quality of the grain. Claimant’s work as a scale house operator was performed in a heated and air-conditioned building with ventilation. Claimant testified she was neither exposed to grain dust nor experienced any breathing or other pulmonary symptoms while performing her job in 2009. Claimant worked for respondent in 2009 for 4-5 months.

On approximately August 27, 2010, claimant again began working for respondent. However, in 2010 she worked as a grain elevator operator. She described her duties in 2010 as follows:

¹ R.H. Trans. at 7-8.

² Also referred to as the “impairment exception” and the “impairment defense.” *Wiehe v. Kissick Const. Co.*, 43 Kan. App. 2d 732, 232 P.3d 866 (2010).

A. My duties were to empty trucks after they were scaled in. They would come over to my pit, I would crawl under them, open the shafts, empty them. I would sweep the grain when they pulled away.

I would have to work inside the tanks to turn the dials to shift the belts, where to dump the grains, and any grain spills, I would have to sweep or shovel up.

And to keep the dust down on the top of the elevator, I'd have to go up there and sweep dust about three, four hours a day to keep the dust down.³

Grain was transported to respondent's facility by truck. The trucks would drive to an open pit and drop its grain. As a grain elevator operator, claimant was exposed to airborne grain dust. Respondent provided her with a cloth breathing mask. Respondent had some old tanks and elevators that had not been used for 6-7 years and claimant was directed to clean the shafts. According to claimant, she was covered from head to toe with weevils, bugs and termites. Claimant testified:

Q. After performing this job for a period of time, did you start to develop some problems?

A. It was just within a couple of days after that that [sic] I started getting a cough, and I started getting a fever, that's what made me think I was catching a cold, and that's when I went to a doctor and they said that I had developed a weevil, grain weevil infection.⁴

Claimant initially sought medical treatment with Dr. Wangia at Heart of Kansas Family Health on October 13, 2010. Dr. Wangia ordered chest x-rays and referred claimant to Dr. Keener and to Dr. Kerby, both pulmonary specialists. Dr. Keener prescribed some inhalants.

Dr. Kerby saw claimant on two occasions at the request of respondent's counsel, December 14, 2010, and February 23, 2011. Claimant felt her breathing treatments worsened her breathing. Claimant has not worked since October 2010.⁵

Claimant testified she did not have any problems with breathing before the injuries alleged in this claim occurred. Before 2010, claimant smoked cigarettes. Claimant

³ R.H. Trans. at 12-13.

⁴ *Id.* at 15.

⁵ It is unclear precisely when claimant last worked for respondent, October 22, 2010 or October 13, 2010. Young Depo. at 12; R.H. Trans. at 11.

testified she quit smoking cigarettes following the alleged injury, shortly after she developed breathing difficulties. She claimed she has not smoked tobacco since that time. Claimant also admitted she had smoked illegal drugs, specifically crack cocaine, however, she claimed she had not smoked illegal drugs since 2006.

Dr. Kerby is board certified in internal medicine, pulmonary disease, and critical care. For many years, Dr. Kerby has been a professor at the University of Kansas School of Medicine. Dr. Kerby initially diagnosed claimant with vocal cord dysfunction. After additional diagnostic testing, Dr. Kerby concluded claimant had adult onset asthma. Dr. Kerby testified:

Q. What brings -- in Ms. Young's situation what has caused the adult onset asthma in your opinion?

A. I think the smoking, and whether it's cigarettes or crack cocaine, they both are respiratory irritants and lead to asthma. Also exposure to dust, and to dust to which she could become allergic, like grain dust can also be a cause of asthma.

Q. In this particular case, given the timing of events, is it more likely than not that what triggered this was the grain dust and the irritants around the grain elevator?

A. I think it was a factor. If she had not been a smoker she might have tolerated those. So you know, I can't say that one is more important than the other. In fact I said it was 50/50. I can't really dissect out that one was more important. I think they were both factors.⁶

Based on the AMA *Guides*,⁷ Dr. Kerby determined claimant had a 20% whole person impairment of function due to her asthma. The doctor apportioned 50% of claimant's functional impairment to smoking and "lifestyle" and the remaining 50% to grain dust exposure. Dr. Kerby opined that claimant was "capable of mild to moderate degrees of physical activity in an environment free of smoke, dust, fumes, other respiratory irritants, or extremes in temperature."⁸

⁶ Kerby Depo. at 7-8.

⁷ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

⁸ Kerby Depo., Ex. 2 at 1.

Dr. Kerby reviewed the unduplicated list of claimant's former work tasks prepared by Jerry Hardin⁹ and concluded claimant could no longer perform 36 of the 71 tasks for a 51% task loss.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(d)(2) provides in pertinent part:

The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances

The same statute goes on to list specific quantitative levels of alcohol and other drugs and substances. Concentrations of the listed drugs or alcohol in the body of an injured worker at or above the specified levels creates a conclusive presumption that the employee was impaired by the alcohol or drugs. There is no argument in this claim that the conclusive presumption applies.

Subject to the other provisions in K.S.A. 2010 Supp. 44-501(d)(2), the burden is on respondent to prove the intoxication defense. To successfully prove the defense, respondent must demonstrate claimant was "impaired" within the meaning of the statute and that claimant's injury, disability or death was "contributed to" by claimant's use of alcohol or drugs.¹⁰

Regarding the impairment required to prove the intoxication defense, the Kansas Court of Appeals in *Wiehe* stated:

Impairment is defined as "[t]he fact or state of being damaged, weakened, or diminished." Black's Law Dictionary 819 (9th ed. 2009); see also Webster's II New College Dictionary 553 (2001) (Impair means to "decrease in strength, value, amount, or quality."). Thus, when a person is impaired, it follows logically that the person's mental and physical faculties are damaged or diminished.

⁹ Mr. Hardin's task list was admitted into evidence without objection at the regular hearing.

¹⁰ *Wiehe v. Kissick Const. Co.*, *supra*; *Williams v. Aero Transportation Products*, No. 1,037,698, 2008 WL 2673203 (Kan. WCAB Jun. 30, 2008).

Since this claim primarily requires the Board to construe and apply K.S.A. 2010 Supp. 44-501(d)(2), it is appropriate to review some basic rules of statutory construction. In *Bergstrom*,¹¹ the Kansas Supreme Court held:

When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).

The fundamental rule of statutory construction is that the intent of the legislature governs when intent can ascertain that intent.¹² We must give effect, if possible, to the entire Act and every part thereof. To this end, it is the Board's duty, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible.¹³

ANALYSIS

The Board agrees with the ALJ that respondent did not prove the intoxication defense. The Award is affirmed.

The Board discovered no Kansas appellate court opinion or Board order that applied the provisions of K.S.A. 2010 Supp. 44-501(d)(2) in circumstances such as those presented in this claim.

Respondent argues claimant's injury is adult onset asthma and that claimant's use and consumption of tobacco and crack cocaine, by means of smoking, contributed to the development of that condition and to the disability resulting from the asthma.

K.S.A. 2010 Supp. 44-501(d)(2) does provide a list of alcohol and other drugs which are conclusively presumed to prove impairment if the concentration of those substances is at or above the precise levels identified in the statute. However, there is no evidence in this record to demonstrate that when this claim arose claimant had any concentration of the listed substances or any other intoxicant. The undisputed evidence shows claimant

¹¹ *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

¹² *In re Marriage of Killman*, 264 Kan. 33, 42, 955 P.2d 1228 (1998).

¹³ *KPERS v. Reimer & Koger Assocs., Inc.*, 262 Kan. 635, 941 P.2d 1321 (1997).

last smoked crack cocaine in 2006. There is no evidence that there was any residual of the crack cocaine in claimant's body when the injury occurred.

Claimant admitted she continued to smoke cigarettes until her breathing difficulties commenced after her 2010 exposure to grain dust and the other airborne irritants. The evidence is undisputed claimant has not smoked cigarettes since she quit in 2010. Respondent has cited no authority that the intoxication defense was intended by the legislature to apply to the smoking of cigarettes. Cigarette smoking is undoubtedly an unhealthy activity which can cause a host of diseases, including asthma. However, the Board finds the intention of the legislature was not to include smoking tobacco with the intoxicating or mind-altering substances discussed in K.S.A. 2010 Supp. 44-501(d)(2).

Moreover, respondent has not proved that claimant was "impaired," within the meaning of K.S.A. 2010 Supp. 44-501(d)(2). The undisputed testimony of claimant was she experienced no prior symptoms of asthma, or any other pulmonary issues, before she worked for respondent in the 2010 fall harvest. Uncontroverted evidence that is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive.¹⁴

The Board finds that claimant was not "impaired" within the meaning of that term in K.S.A. 2010 Supp. 44-501(d)(2). The Board also finds that there is no evidence of any presence of crack cocaine in claimant's body when her injury occurred. Finally, the Board finds that smoking tobacco was not intended by the legislature to be included within the "use or consumption of alcohol or any other drugs, chemicals or any other compounds or substances" to which the defense was intended to apply.

CONCLUSIONS OF LAW

1. Claimant sustained personal injury by accident arising out of and in the course of his employment.

2. The "intoxication defense" set forth in K.S.A. 2010 Supp. 44-501(d)(2) is inapplicable to this claim.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁵ Accordingly, the findings

¹⁴ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

¹⁵ K.S.A. 2010 Supp. 44-555c(k).

and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of ALJ Bruce E. Moore dated June 27, 2012, should be, and hereby is, affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of May, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge